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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 670.

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SANA LABORATORIES, INC., JAMES A. IORIO and EDWARD JAMES IORIO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF FOR THE PETITIONERS.

HARLAN BESSON,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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SANA LABORATORIES, INC., JAMES A. IORIO and EDWARD JAMES IORIO, Petitioners,

vs.

THE UNITED STATES OF AMERICA.

(See R. 1 for title in Court below. Title given conforms to record printed by Clerk of this Court.)

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Sana Laboratories, Inc., a corporation of the State of New Jersey, James A. Iorio and Edward J. Iorio, respectfully submit their petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit in the above entitled proceeding.

History of the Case.

On December 3rd, 1936 (R., p. 12) petitioners commenced an independent proceeding by verified petition and order to show cause in the United States District Court for the District of New Jersey, before any indictment was found, seeking the suppression of evidence and the return of certain alcohol, records, documents, books and papers seized by agents and inspectors of the Alcohol Tax Unit of the Treasury Department of the United States on November 7th, 9th and 10th, 1936, on the premises of Sana Laboratories, Inc., located at 574-576 Jeanette Street, Union City, New Jersey. The United States Attorney to whom the order to show cause was directed appeared in the proceeding and resisted the application. On April 7th, 1937, a memorandum opinion was handed down in the United States District Court for the District of New Jersey by Judge Fake on a preliminary procedural question. This directed the presentation of an order to take testimony which was allowed on December 20, 1937 (R., p. 29). Testimony was taken on March 3 and 7, 1939. Judge Fake handed down a further memorandum decision on March 25, 1940 (R., p. 5) denying the petition to suppress but ordering the return of the seized records and papers, and on June 10, 1940 an order was entered in conformity with this determination. On March 31, 1938 an indictment was found against the petitioners.

Thereupon an appeal from this order was taken to the United States Circuit Court of Appeals for the Third Circuit which on the 6th day of November, 1940, filed an opinion by Hon. Herbert F. Goodrich, Circuit Judge, affirming the judgment below. A petition for rehearing was filed, which was denied on December 2, 1940. This petition is

filed to obtain review of the decision of the Circuit Court of Appeals.

Statement of Facts.

The facts have been stated by the Hon. Herbert F. Goodrich, Circuit Judge, in the opinion filed in the Court below, in substantial agreement with the statement which follows (R., p. 35). There is no factual controversy involved except upon the question of consent and this was not discussed in the opinion by the Circuit Court of Appeals.

The petitioner, Sana Laboratories, Inc., a New Jersey Corporation, was in November, 1936, a holder of a permit to use specially denatured alcohol, Form 1481 under Title 111 of the National Prohibition Act, Permit No. SDA—N. J.-1012, in the course of the manufacture of certain mouth washes, hair tonics, lilac lotions, perfumes, etc., as is more specifically set forth in said permit. It was allowed to withdraw under permit, specially denatured alcohol for this purpose, and keep it in a storeroom on the premises located at 574-576 Jeannette Street, Union City, New Jersey, where it conducted its business.

On Friday evening, November 6, 1936, an investigator of the Alcohol Tax Unit of the Treasury Department who had been keeping Sana's plant in Union City under observation for some days, saw a truck take on 6 drums of alcohol at the plant, followed the truck about a half a mile from the plant, arrested the driver and seized the drums of alcohol from which the serials numbers had been removed. The next morning, Saturday, November 7, at about 8 A. M., this investigator accompanied inspectors from the Alcohol Tax Unit entered the Sana plant after having been admitted by Alfred Iorio, a feeble minded man, brother of

the petitioner, James A. Iorio, in response to raps on the door. They had no warrants of arrest nor did they have a search warrant. No one was on the premises at the time but the said Alfred Iorio and obviously no crime was being committed on the premises at the time. Nevertheless, the government agents arrested Charles Iorio, Paul Losick and Frank Eckert as soon as they entered the premises. The petitioner, James A. Iorio, who lived near the plant was sent for and arrested. He denied having any connection with the business. When it appeared that neither he nor any of the others arrested could locate the alcohol manufacturing records and the keys to the alcohol vault, the bookkeeper, Florence Losick was sent for (but not arrested) and she supplied these records and posted them currently. The agents seized and trucked away 17 drums of alcohol found in the vaults on the premises and at about eleven o'clock took Charles Iorio and James A. Iorio, Paul Losick and Frank Eckert to Newark, ten miles distant, for questioning and arraignment before the United States Commissioner. They were fingerprinted and held to bail after formal complaints had been filed against them. Other Agents remained on the premises and made a search which has been described by Dr. James A. Iorio, petitioner herein, as follows:

> "I noticed in the office of the laboratory, invoices, bills, billheads and letters, and drawers—letters scattered all over the different sections of the office, on tables and on desks. I entered into the laboratory and I found upon the counter a bottle of strychnine which was laying on the counter; half of it had been spilled on the counter" (R., pp. 49-50).

The government agents then took the manufacturing records from Miss Losick and removed them to Newark, New Jersey.

The following Monday, November 9th, two days later, the agents returned and placed in a box invoices, and bills for materials used in the manufacture and sale of alcohol preparations. Dr. James A. Iorio at that time objected to the agents taking the box because no one was on the premises in authority. Whereupon the agents sealed it and left it over night. The next day, Tuesday, November 10th, the agents took the box from Dr. James A. Iorio and his son Edward J. Iorio after Edward J. Iorio had consulted his counsel and had been advised as follows:

> "Well, if they have to take them you can't do anything about it." (See R. 51, fol. 21.)

The books and records taken were the property of Sana Laboratories, Inc.

On April 14, 1937, the government filed a libel for forfeiture in four counts, two counts against 6 drums of alcohol, seized on Friday evening, November 6th, 1936, and two counts against the 17 drums of alcohol, seized on the premises of Sana plant the following day (R., p. 25). On March 2, 1938, the United States District Court for the District of New Jersey entered a decree forfeiting the 6 drums mentioned in the first two counts of the libel and dismissing the libel as to the 17 drums seized on the morning of November 7th, 1936 (R., p. 10). The claimant, petitioner herein, Sana Laboratories, Inc., challenged this seizure on the ground that it was unlawful in the answer filed in the libel proceeding. It was contended in the District Court upon the application for suppression that this decree was *res adjudicata* on the question of the lawfulness of the seizure. Judge Fake ruled adversely on this contention and the Circuit Court of Appeals for the Third Circuit did not mention the question in its opinion although the question was raised in that Court by the petitioners.

An indictment, naming as defendants the three appellant petitioners and eleven other persons charging conspiracy to defraud the United States by diversion of tax free alcohol for taxable purposes, was returned March 31, 1938. The indictment alleged, as one of the overt acts, the diversion of alcohol on the evening of November 6th, 1936, and also alleged that the plans of the conspirators included Sana's maintenance of false books, records and invoices. (R., p. 30).

Questions Presented.

1. Does the right of government agents to inspect the operations, manufacturing records and invoices on the premises of a permittee authorized to use specially denatured alcohol, also authorize, as an incident, the right to arrest without warrant persons on the premises and to summarily seize without search warrants the manufacturing records, invoices and other records of the permittee and remove them from the premises and use them or information obtained from them in evidence in criminal proceedings against the petitioners. (This it is contended violates the constitutional rights of the permittee and other persons as defined by *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Boyd* v. *United States,* 116 U. S. 616, 6 Sup. Ct. 524, 29 Law Ed. 746; *Go-Bart Importing Co., etc., et al.* v. *U. S.,* 282 U. S. 344.)

2. Was the decree in the libel proceeding acquitting the 17 drums of alcohol seized on the Sana Plant on the morning of November 7th, 1936, *res adjudicata* on the question of the validity of the other seizures made on the same day and as part of the same transaction?

Reasons Relied On for the Allowance of the Writ.

It is respectfully contended for the petitioners that the court below has decided a Federal question in a way probably in conflict with applicable decisions of this Court and that it has decided an important question of Federal law which has not been but which should be settled by this Court. The Court below held that because there was no unlawful entry by the government agents upon the premises preceding the arrests, searches and seizures, that their right to inspect the premises justified no further relief than the return of the seized documents which cured any wrong which might have been done, and that the removal of papers and records from the premises which the government agents were, under the circumstances, entitled to inspect upon the premises, did not render sacrosanct information secured from these papers because such information was lawfully open to the government upon inspection. To support this decision, the court below cited *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 and in its opinion in the case subjudice said:

> "It is only knowledge gained by the governments own wrong which cannot be used" (R. 38 and 39).

It is respectfully contended that this reasoning is logically fallacious and in direct conflict with the judicial determination in the *Silverthorne Lumber Co.* case, *supra,* the precise language of the opinion in which case on this point is as follows:

> "* * * The essence of a provision forbidding the acquisition of evidence in a certain way is not merely evidence so acquired shall not be used before the court, *but that it shall not be used at all.* * * *" (Italics by counsel.)

It is further respectfully urged that the Court below placed undue emphasis on the importance of the fact that the element of unlawful entry into the Sana premises was lacking. This Court in the case of *Boyd* v. *United States, supra,* clearly points out the breaking of doors and the forcing of an entry are not vital factors. (See opinion in that case at page 630 and at 635.)

Even assuming that the presence of the element of unlawful entry, in the case *sub judice,* is essential to a finding that the search and seizure made were unlawful, the rule laid down in the Six Carpenters' case (1610) 8 Coke 146a, 77 Eng. Reprint 695, it is respectfully urged, is properly applicable to the situation herein. It was held in that case:

> "* * * it was resolved when an entry, authority or license is given to anyone by the law, and he doth abuse it, he may be a trespasser ab initio; * * *"

The seizure of the books and papers without a search warrant was an abuse of the authority given to enter and inspect and the entry becoming a trespass *ab initio* was tantamount to an initial unlawful entry.

No case has been discovered by counsel where the precise question involved has been before this Court. This Court in the *Go-Bart* case, *supra,* has stated with approval an opinion in the United States District Court for the Southern District of New York in the case of *Kraus* v. *United States,* 270 F. 578. This case involved a search without warrants of premises used by an alcohol permittee. The court in that case held that the search was illegal and the seized papers should be returned and further directed that no testimony or evidence of any transaction recorded in any of the papers seized should be offered upon the trial

unless the respondents could show they got the information independent of their wrongful possession.

It is respectfully contended that the Court below erred in its determination that the information contained in the papers seized might be used even though the seizure of them was unlawful and that whatever wrong might have been done has been cured by a direction for the return of the seized papers and records. It is respectfully urged that the effect of its decision is to sanction a method of enforcement repugnant to the 4th and 5th Amendments to the Constitution and in conflict with the interpretation of the Constitution of this Court in the Silverthorne, Go-Bart, and Boyd cases, *supra.*

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify the case to this Court for review and determination, as provided by Section 240 (a) of the Judicial Code, 28 U. S. C. A. Sec. 347 (a), and that your petitioners may have such other and further relief in the premises as this Court may deem proper.

HARLAN BESSON,
Counsel for Petitioners.